BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit R. 128) is reported at 139 Fed. (2d) 274, (Advance Sheet, February 7, 1944).

The opinion of the District Court for the Eastern District of New Jersey (R. 109a) is not yet reported.

Basis for Jurisdiction.

Jurisdiction is invoked by petitioners under Section 240a of the Judicial code.

The petition herein is filed under the Supreme Court Rule 38, Paragraph 5b.

Statute Involved.

This action was brought under the Miller Act, 49 Stat. at L. 793, Act Aug. 24, 1935, c. 642, Sections 1 and 2; 40 U. S. C. A. Section 270a and 270b.

The provisions of Section 2 (a) of said Act pertinent to the issues in this case are set forth in Appendix A hereto.

Statement.

The facts in this case are summarized in the petition herewith. They are not disputed.

Argument.

POINT I.

The Decision of the Circuit Court of Appeals That There Was a Contractual Relationship Between Petitioner and Respondent Under the Miller Act Is Untenable, and in Conflict with the Weight of Authority and Applicable Decisions of This Court.

How the Circuit Court of Appeals found such "Contractual Relationship."

The Circuit Court of Appeals found that there was a direct contractual relationship between petitioner and re-

spondent so as to give the latter a right of action against the petitioner without the requirement that respondent serve the ninety day notice provided by Section 2 (a) of the Miller Act.

In arriving at said determination the Circuit Court of Appeals disregarded the dealings between respondent and the subcontractor Knecht which evidenced a contract between the respondent and the subcontractor.

The Circuit Court of Appeals held that the contractual relationship between petitioner and respondent was based upon the following facts and conclusions:

The court concluded that petitioner's telegram of January 21st, 1941, and letter of January 27th, 1941, constituted an offer to the respondent for the material in accordance with the terms theretofore agreed upon between respondent and the Government (R. 131).

The court found that "there was no subsequent written or oral communication from Worthington to Johnson which would constitute an acceptance" (R. 131).

The Circuit Court of Appeals found however that petitioner's offer was accepted by the act of shipment of the material. It said: "We think that Johnson's offer was accepted by Worthington's performance in furnishing the equipment ordered." It stated that such conclusion was supported in one of two ways: first, that Johnson's order was an offer inviting a unilateral contract which the respondent accepted by the shipment of the goods and "alternatively, Johnson's letter to Worthington might be termed an offer inviting a bilateral contract for which Worthington's acceptance might be expected to be a promise to perform the execution of the order for the goods as outlined in its correspondence with the Government. But instead of replying with a promise Worthington replied with performance forthwith, that is, the shipment of the specified goods" (R. 131).

The Shipment of the Material Could Not Have Been an Acceptance of Petitioner's Offer.

In arriving at the above conclusion the court disregarded the undisputed facts in the record which negatived the theory that respondent accepted petitioner's offer by the shipment of the material.

It will be recalled from the statement of facts in the petition that the court below specifically approved the finding of the Trial Court that petitioner's letter of January 21st, 1941 (the offer) was received by the respondent too late to affect the shipment (see Opinion, Marginal Note P. 130) and it will also be recalled that the bill of lading for the shipment was actually made to the Fuller Co. and to the subcontractor Knecht and bore the respondent's works number P-213226/227 which was the number given by the respondent to the subcontractor's order No. 2005 (R. 74a).

The shipment of the material therefore could not have been an acceptance of the offer contained in petitioner's letter, since such offer was not received prior to the shipment.

Even if the Trial Court had found, and the Circuit Court of Appeals had affirmed a finding, that the letter of January 27, 1941, had not been received too late, as petitioners contended in both courts, there would still have been no contract between petitioner and respondent, since respondent deliberately ignored such letter which directed the forwarding of shipping notices to petitioner and the forwarding of copies of blue-prints and any other data required to be submitted for approval in triplicate to the field office of petitioner (R. 72a).

This applies similarly to the respondent's disregard of petitioner's telegram of January 21st, 1941. Instead of recognizing and acknowledging petitioner's offer, respondent executed the order given by the subcontractor, shipped

the material to the subcontractor and charged the subcontractor exclusively therefor (R. 91a).

It would seem from the above that the Circuit Court of Appeals has construed the term "contractual relationship" as used in Section 2 (a) of the Miller Act contrary to the established principles of offer and acceptance and the law of contracts.

Respondent at no time, either in the Trial Court or in the Circuit Court of Appeals, contended that it accepted petitioner's offer by the shipment of the material. On the contrary, it appears from the complaint (Paragraph 8) that the contention of the respondent was that it entered into an agreement with the United States and that the United States assigned the agreement to the petitioner and that the respondent was obliged to furnish the material under its agreement with the United States and not under any agreement with the petitioner (R. 5a).

The Circuit Court of Appeals in holding that petitioner invited a bilateral contract in which the respondent's acceptance was in the shipment of the material and that such performance constituted completion of a contract cites 1 Williston on Contracts (Rev. Ed., 1936) Section 78A (R. 131).

One who makes an offer of a bilateral contract is entitled to assume that notice of acceptance will be communicated in the manner required for all bilateral contracts. Williston in the section referred to states that acceptance of a bilateral contract by performance is subject to the requirement that the offerer be notified of such acceptance as a condition precedent to its enforcement, and Williston also states (Section 76) that an acceptance must be specifically in accordance with the terms of the offer.

In this case the respondent not only failed to communicate with the petitioner but disregarded the terms of the

offer which directed that the respondent forward shipping notices to the petitioner as well as copies of blue-prints and other data required to be submitted for approval by the petitioner (R. 72a).

Hence, in any event, shipment alone could not constitute acceptance of the offer, since by the terms of the offer respondent was also required to forward shipping notice, blue-prints and other data to the petitioner, all of which it failed to do, but instead sent them to the subcontractor (R. 77a).

In the early case of *Eliason* v. *Henshaw*, 4 Wheat. (U. S.) 225, 228, 229, this Court said:

> "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualifications of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open and imposes no obligation upon either."
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> "It is no argument that an answer was received at another place. Plaintiffs in error had the right to dictate the terms upon which they would purchase and unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between the parties."

This Court in *Baltimore & Ohio Railroad Co.* v. *U. S.*, 261 U. S. 592, 597, construed the words "implied agreement" under the provisions of the Dent Act which authorized compensation for expenditures when made by a claimant against the United States upon the faith of an agreement

"express or implied" with an United States officer or agent. This Court said:

> "The implied agreement contemplated by the act as the basis of compensation is not an agreement implied in law, more aptly termed a constructive or quasi-contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress, but an agreement implied in fact founded upon a meeting of the minds, which although not embodied in an express contract, is inferred as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. * * * Such an agreement will not be implied unless the meeting of minds was indicated by some intelligible conduct, act or sign."

In this case respondent's disregard of petitioner's telegram and letter and its failure to send petitioner any notices or drawings as requested showed that as between petitioner and respondent there was no meeting of the minds and no indication by "conduct, act or sign" that respondent intended to do business with the petitioner or to contract with it. The shipment of the material stated by the Circuit Court of Appeals to have been the act of acceptance completing the contract could not have been such an act, since as the Circuit Court of Appeals affirmed, petitioner's offer was received by the respondent too late to affect the shipment, not considering the fact that the shipment was sent and addressed not to the petitioner at all but to the subcontractor.

Respondent's Failure to Explain Why It Did Not Charge Petitioner.

The Circuit Court of Appeals recognized that the respondent had received "specific and numerous letters from the War Department and Johnson that the latter was the

principal contractor and was to be charged for the equipment" (R. 132).

The court also recognized that the respondent sent statements and claim letters to the subcontractor and entered charges upon its books for the material solely against the subcontractor (R. 132). However, the court said as to this: "Why Worthington failed to do so (i.e. charge the petitioner) is not explained. We think it does not matter" (R. 132).

This comment by the Circuit Court of Appeals is not justified by the facts. The failure of the respondent to charge the petitioner is fully explained. Such explanation is contained in the fact that respondent dealt solely with the subcontractor and charged him alone for the material and looked to him alone as its debtor.

It will be recalled from the statement of facts that respondent in writing to the subcontractor after having received a request for information from the petitioner said: "This as you know covers feed water heaters furnished on *your* order to Fort Dix" (R. 82a), and in writing to the petitioner respondent enclosed a copy of its *invoice to the subcontractor* (R. 84a) and referred to "*the balance owed us by Knecht,*" and stated that "this was in connection with *the equipment furnished Knecht* for Fort Dix" (R. 87a).

In view of the above facts, if there was any other explanation by the respondent to show why it did not charge the petitioner it was most material, contrary to the statement of the Circuit Court of Appeals that it did not matter, and it was essential to the establishment by respondent of a contractual relation between it and the petitioner independent of its clear and undisputed contract with the subcontractor, that such explanation be made.

The silence of the respondent towards petitioner's com-

munications to it could only have been interpreted by the petitioner to mean that the respondent had received an order for the material from the subcontractor and was executing it in the regular course and would look to the subcontractor for payment.

> "One who keeps silent knowing that his silence would be misinterpreted should not be allowed to deny the natural interpretation of his conduct."
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> *Laredo Nat'l Bank* v. *Gordeon*, 61 F. (2d) 906, C. C. A. 5, quoting Williston on Contracts, Section 91, 91a.

The Practical Construction of the Transaction by Respondent Itself.

Bearing upon respondent's relations with the subcontractor and the absence of any dealings by respondent with the petitioner, the well-established principle applies that the practical construction given to transactions by the parties themselves will be followed by the courts in construing contracts bearing on such transactions.

The dealings between the respondent and the subcontractor and the absence of any dealings between the respondent and the petitioner indicate that the respondent recognized that it had no contract with petitioner and that it did have a contract with the subcontractor.

> "The practical interpretation of an agreement by the parties to it is always a consideration of great weight. There is no surer way to find out what the parties meant than to see what they have done. Self-interest stimulates the mind to activity and sharpens its perspicacity. Parties in such cases usually claim more but rarely less *they* they are entitled to. The probabilities are largely in the direction of the former."
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> *Brooklyn Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273, 24 L. Ed. 410 (1877).

A contract will not be given an unreasonable interpretation in contravention of the clear purpose and manifested intention of the parties.

Richardson v. *Western Oil Co.*, 3 Fed. (2nd) 403, 407 (1924), C. C. A. 8.

Respondent had a right to select and determine with whom it would contract.

Arkansas Smelting Co. v. *Belden Co.*, 127 U. S. 379.

In this case respondent selected the subcontractor as the person with whom it would contract.

Where the record discloses no binding acceptance by a materialman of the contractor's order, there is no contract between them which can be enforced.

Truscon Steel Co. v. *Cooke*, 98 F. (2d) 905, C. C. A. 10.

The decision of the Circuit Court of Appeals was clearly untenable and in conflict with the weight of authority and with applicable decisions of this Court.

Point II.

The Decision of the Circuit Court of Appeals in Construing the Term "Contractual Relationship" as Used in Section 2 (a) of the Miller Act Contrary to Established Principles of Law Has Nullified the Protection Given to Contractors by the Act and Has Created a Right of Action Not Authorized by Congress and Unfounded in Law.

The object of requiring notice to the contractor under the Miller Act is to protect the contractor by enabling him to withhold payments from the subcontractor until the expiration of ninety days from the last delivery of materials. Such notice is a jurisdictional prerequisite to an action by

a material man against the contractor with whom the material man has not dealt with directly.

Fleisher Engineering & Construction Co. v. *Hallenbeck*, 311 U. S. 15.

The right granted by the Miller Act in such cases is purely a statutory grant and Congress could impose conditions with respect thereto. In fact, the notice to the contractor was intended to be the presentation of a claim. An invoice to a subcontractor even when exhibited to a principal contractor is not a substitute for the notice required by the act.

U. S. for Use American Radiator Co. v. *North Western Engineering Co.*, 122 F. (2d) 600, C. C. A. 8.

Mere knowledge, approval, and even consent of the contractor to the furnishing of the equipment by the material man on the project in which the contractor is engaged is not enough to establish a contractual relationship between the material man and the contractor under the provisions of the Act.

It may be assumed that petitioner knew, approved and consented that the respondent's material be furnished and used in the construction. In fact, petitioner had passed on to the subcontractor the name of respondent as a source of supply for the items upon which respondent had submitted its bid to the Government. Furthermore, the petitioner had even offered to purchase said material directly from respondent. Respondent, however, refused to recognize the petitioner as its debtor or as the person to be charged for the material.

In such case petitioner was justified in assuming that respondent was doing business with the subcontractor and not with the petitioner. Petitioner was also justified in relying upon the protection given to him by the Miller Act in the event that the subcontractor failed to pay respondent

for its material. Respondent, however, having failed to give petitioner the notice required by the Act, petitioner thereupon paid the entire amount due on the contract with the subcontractor (R. 34a, 43a). The decision of the Circuit Court of Appeals has deprived petitioner of the protection given to contractors by the Act, and has created a cause of action against petitioner unauthorized by Congress and unfounded in law.

Point III.

It Is in the Public Interest and Important for Contractors, Sureties and the Government That This Court of Last Resort Decide What Is Meant by the Term "Contractual Relationship" as Used in the Miller Act and by What Rules of Law the Same Is to Be Determined.

The Circuit Court of Appeals has given a strained and unprecedented meaning and application to the words "contractual relationship" in an endeavor to extend the benefits of the Miller Act to a material man even though he has failed to comply with the condition as to notice provided by the Act.

In fact, said Circuit Court of Appeals held in the case of United States to the use of *Calvin Tomkins Co.* v. *Clifford F. MacEvoy Co.*, 137 Fed. (2d) 565, in which this Court granted certiorari and which is now pending in this Court (October Term 1943, No. 483), that the provisions of Section 2 (a) of the Miller Act requiring notice to the contractor is not a limitation but an extension of the "ambit" of the Act.

Petitioners submit that it is in the public interest that the proper construction to be given to the term "contractual relationship" as used in the Miller Act should be settled by this Court, and that it is important for contractors with the Government, and sureties on payment bonds furnished under the Act, to know whether their liability upon

the theory of contractual relationship is to be determined in accordance with the established law of contracts or not. It is also important for contractors to know whether in the absence of such a contractual relationship, as governed by the law of contracts, they are to have, or to be deprived of, the protection given to them by the Miller Act in the ninety day notice provided therein.

It is also important from the standpoint of the Government that this Court should settle the nature and construction of the term "contractual relationship" as used in the Miller Act, since if the said term is to be extended and strained so as to include relationships not heretofore recognized as constituting binding contracts under established principles of law, then the same must affect bids made by contractors on Government work so as to increase the same far beyond present limits of prospective liability based on such established principles.

Conclusion.

Upon the grounds assigned, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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